

Exhibit C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARA W. SWINDLE,)	
)	
Plaintiff,)	
)	
v.)	CASE 2:09-CV-01458-SLB
)	
JEFFERSON COUNTY COMMISSION;)	
JEFFERSON COUNTY, ALABAMA;)	
JEFFERSON COUNTY PERSONNEL)	
BOARD; MIKE HALE, in his)	
official capacity; RANDY STONE,)	
in his individual capacity; and)	
DAVID NEWTON, in his individual)	
Capacity,)	
)	
Defendants.)	

DEFENDANT MIKE HALE'S MOTION TO DISMISS

COMES NOW Defendant Sheriff Mike Hale, in his official capacity ("Sheriff Hale"), and moves this Honorable Court for an Order dismissing this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) as Plaintiff has failed to state a claim against Sheriff Hale. In support of his motion, Sheriff Hale shows the Court as follows:

I. STANDARD OF REVIEW

A complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Roe v. Aware Woman Center for Choice, Inc., 253 F.3d 678, 683

(11th Cir. 2001). Although the court must take the allegations in a complaint as true when reviewing motions to dismiss, it is not permitted to read into the complaint facts that are not there. Beck v. Interstate Brands Corp., 953 F.2d 1275 (11th Cir. 1992).

II. PLAINTIFF'S CLAIMS

Plaintiff claims she was subjected to sexual harassment, retaliation, and discrimination on the basis of her sex. She has asserted the following claims against the specified Defendants:

Count I: Violations of 42 U.S.C. §1983, brought pursuant to the 14th amendment to the United States Constitution, against Deputies David Newton ("Newton") and Randy Stone ("Stone"), and Title VII violations of sexual harassment and sex discrimination against Newton and Stone;

Count II: Title VII violation based on retaliation against all Defendants;

Count IV¹: assault and battery against all Defendants;

Count V: invasion of privacy against all Defendants;

Count VI: outrage against all Defendants; and

Count VII: negligent and/or wanton supervision, training, and retention against all Defendants.

¹ There is no Count III.

III. ARGUMENT AND CITATION OF AUTHORITIES

Sheriff Hale is entitled to a dismissal of Plaintiff's Complaint against him. Sheriff Hale is entitled to immunity on certain claims brought by Plaintiff. Plaintiff has also failed to plead facts that support a Title VII claim of retaliation to the extent she has attempted to bring this claim against Sheriff Hale. Additionally, certain claims brought by Plaintiff are time-barred. Sheriff Hale has addressed individually Plaintiffs' various counts as asserted in her Complaint.

A. COUNT I - 42 U.S.C. § 1983, 14TH AMENDMENT, AND TITLE VII

Count I of Plaintiff's Complaint asserts claims only against Defendants Newton and Stone and not against Sheriff Hale. To the extent Plaintiff may attempt to amend her Complaint to bring this count against Sheriff Hale, however, Sheriff Hale is immune from Plaintiff's § 1983 and 14th amendment claims. Additionally, certain claims brought by Plaintiff in Count I are time-barred.

1. Sheriff Hale is entitled to absolute immunity for Plaintiff's § 1983 and 14th amendment claims.

Should this Court determine that Plaintiff has stated claims against Sheriff Hale in Count I of her Complaint, or should she attempt to do so by amendment, Sheriff Hale is

entitled to 11th amendment absolute immunity from Plaintiff's claims pursued under §1983 and the 14th amendment to the U. S. Constitution. Plaintiff has sued Sheriff Hale in his official capacity only. Doc.1, ¶ 7. Under Alabama law, sheriffs are deemed executive officers of the state. "The executive department shall consist of . . . a Sheriff for each county." Ala. Const. of 1901, Art. V, § 112. Pursuant to § 112, a Sheriff is an employee of the State, not a county. Hereford v. Jefferson County, 586 So. 2d. 209, 210 (Ala. 1991); Parker v. Amerson, 519 So. 2d. 442 (Ala. 1987). In Alabama, the office of Sheriff is a state constitutional office, vested with the immunities of a state official as an agent or "arm of the state." McMillian v. Monroe County, 520 U.S. 781, 785 (1997); see also Ala. Code § 36-22-3.

Based on the foregoing, lawsuits against sheriffs in their official capacities are, in essence, lawsuits against the state. The Eleventh Amendment provides absolute immunity to sheriffs sued in their official capacities, as Plaintiff has done here. Adams v. Franklin, 111 F. Supp.2d 1255, 1262 (M.D. Ala. 2000) (citing Carr v. City of Florence, Ala., 916 F.2d 1521, 1525 (11th Cir. 1990)).

Sheriff Hale is thus entitled to Eleventh Amendment sovereign immunity when sued in his official capacity.

The Eleventh Amendment bars suits for money damages. Actions for prospective injunctive relief are outside the protection offered by the Eleventh Amendment. See, e.g., Carr v. City of Florence, 916 F.2d at 1524 n. 2. In this case, however, Plaintiff has not requested any injunctive relief pursuant to § 1983. Therefore, Plaintiff's § 1983 claims are due to be dismissed in their entirety to the extent Plaintiff has pled these claims against Sheriff Hale.

2. Plaintiff's § 1983 claims are time barred.

The United States Supreme Court has held that courts entertaining claims brought under 42 U.S.C. § 1983 should borrow the state statute of limitations for personal injury actions. Owens v. Okure, 488 U.S. 235, 237 (1989). In Alabama, § 1983 actions are therefore subject to a two year statute of limitation period. Lufkin v. McCallum, 956 F. 2d 1104 (11th Cir. 1992).

The statute of limitation on a claim begins to run when the cause of action accrues. "A cause of action accrues as soon as the claimant is entitled to maintain an action,

regardless of whether the full amount of damage is apparent at the time of the first legal injury." Id. at 16, citing Chandiwalla v. Pate Construction, 889 So. 2d 540, 543 (Ala. 2004).

According to the Plaintiff's Complaint, "[s]ince Plaintiff began her employment with Jefferson County Sheriff's Department, up to and including December 2007, she was sexually harassed by two deputies, Randy Stone and David Newton." Doc. 1, p. 3, ¶12. Plaintiff began her employment on May 22, 2006. Id., at ¶11. Plaintiff filed this lawsuit on July 22, 2009. Accordingly, any \$1983 allegations which occurred prior to July 22, 2007 are barred by the two-year statute of limitations and should be dismissed as a matter of law.

B. COUNT II - TITLE VII VIOLATION BASED ON RETALIATION

Count II of Plaintiff's Complaint does not appear on its face to assert a claim of retaliation against Sheriff Hale. To the extent Plaintiff may be bringing such a claim against Sheriff Hale, however, Plaintiff has not pled facts sufficient to state a claim of retaliation under Title VII.

Plaintiff alleges that she was retaliated against as contemplated by Title VII of the Civil Rights Act of 1964

in the following ways: (1) By being told she would have to work at the Bessemer office, although Plaintiff never had to work in the Bessemer office Doc. 1, ¶49; (2) by being made to do things by herself that required more than one person Doc. 1, ¶¶50 & 53; (3) by having other employees being told of her sexual harassment complaint that was supposed to be confidential Doc. 1, ¶51; (4) by being required to ride to a job in a patrol unit that had a cage, which Deputy Charlotte Ryan, her supervisor, had instructed against Doc. 1, ¶52); (5) by being counseled for allegedly having her feet in her fiancée's lap while on duty Doc. 1, ¶54; and (6) by being required to undergo a polygraph examination to prove that her version of events regarding Ron Michael's allegations of having her feet in her fiancée's lap was true. Doc. 1, ¶57. She further alleges that such conduct caused her "emotional distress, mental anguish, loss of enjoyment of life, inconvenience, and humiliation." Doc. 1, ¶59.

In order to establish a prima facie case of retaliation under Title VII, Plaintiff must show the following: (1) She engaged in protected activity under Title VII; (2) she suffered an adverse employment action; and (3) there was a

causal connection between the protected activity and the adverse employment action. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). The United States Supreme Court has held as follows:

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006).

Thus, not everything that makes an employee unhappy is an actionable, adverse action. Only retaliation that produces an injury or harm such that a reasonable person would have found the challenged action materially adverse is actionable under Title VII.

The actions that Plaintiff complains were retaliatory do not amount to an adverse employment action as required to sustain a Title VII claim of retaliation. Although Plaintiff may believe or speculate about the reasons for

the acts she pled, Plaintiff failed to plead any injury or harm such that a reasonable person would have found the challenged action materially adverse. Therefore, Plaintiff's claim of retaliation under Title VII should be dismissed as to Sheriff Hale.

C. COUNTS IV THROUGH VII - PLAINTIFF'S STATE LAW CLAIMS.

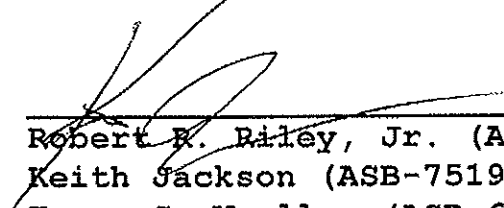
Plaintiff asserts various state law claims against Sheriff Hale in his official capacity. These claims are assault and battery (Count IV), invasion of privacy (Count V), outrage (Count VI), and negligent and/or wanton supervision, training and retention (Count VII). As discussed above, Sheriff Hale has absolute immunity pursuant to the Eleventh Amendment for these claims, and these claims are therefore due to be dismissed.

Furthermore, the statute of limitations for claims stated in Counts V, VI, and VII is two (2) years. Any such claims which occurred prior to July 22, 2007, are time barred.

IV. CONCLUSION

Based on the foregoing, Sheriff Hale respectfully requests that this Court grant his motion and dismiss him from this action with prejudice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2009, I have electronically filed the above and foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record if registered as a participant in the System.

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